

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 2023-004047

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE	SIGNATURE

In the matter between:

K[...] CC

Applicant

and

N[...] S[...]

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be **15 November 2023**.

JUDGMENT

CARRIM AJ

Introduction

- [1] The applicant launched a *rei vindicatio* in respect of a Toyota Land Cruiser, registration number [...] GP (vehicle). The matter was heard on the opposed motion roll on 25 October 2023 on a virtual platform. During the hearing the respondent's counsel advised me that the vehicle was in fact the subject of another court matter namely a Rule 43 application launched by the respondent and that the parties were awaiting a judgment from the Honourable Justice Nkutha- Nkontwana. I then undertook to await the outcome of that matter before handing down judgment in this matter to avoid any possibility of conflicting judgments on the issue.
- [2] On 14 November 2023, the Honourable Justice Nkutha- Nkontwana ruled in the Rule 43 application that the Toyota Land Cruiser, registration number [...] GP be retained by the Respondent *pendente lite*.
- [3] On 15 November 2023 I handed down my order in which I dismissed this application with costs against the applicant on an attorney-client basis. ("order")
- [4] The legal representatives at the time and the parties were all alive to the issues and the material disputes of fact that emerged during the hearing. But for the applicant now having changed its attorneys of record the order would have been self-evident. The new attorneys of record Brits Attorneys were appointed on 24 November 2023 and have requested reasons for my order. These are my

reasons.

Background

- [5] The applicant launched a *rei vindicatio* in respect of the vehicle on the basis that it was the lawful owner, had in the past permitted respondent to use it but now required its return.
- [6] In its founding affidavit, deposed to by Mr R[...] S[...], the applicant a close corporation, the following averments were made:
- [6.1] The deponent Mr S[...] is the sole member of the applicant;
- [6.2] The applicant was the registered owner of the vehicle;
- [6.3] On or about November 2021 the vehicle was lent to N[...] S[...], the respondent;
- [6.4] The applicant had on three occasions demanded that the respondent return the vehicle and the respondent refused. The last demand was made by way of summons erroneously issued in the Heidelberg Regional Court, which was subsequently withdrawn.
- [6.5] Despite demand the respondent has no legal basis to retain the vehicle and has failed to deliver the vehicle.
- [7] In the answering affidavit filed by the respondent, a completely different picture

emerged. The respondent highlighted that the Mr S[...] had not disclosed the following material facts to the court-

[7.1] The deponent and the respondent were married on 25 August 2007, out of community of property with accrual. Two minor children were born of the marriage.

[7.2] Mr S[...] instituted divorce proceedings in this Court and that such proceedings were still under way.

[7.3] The respondent had instituted Rule 43 proceedings due to Mr S[...]’s failure and refusal to properly maintain her and the minor children.

[7.4] The vehicle was not ‘lent’ to her as claimed by the applicant but was provided to her as part and parcel of Mr S[...]’s maintenance obligations towards her and the minor children.

[7.5] Mr S[...] was attempting to hide behind the corporate veil of the applicant to deceive this Court and to abscond his maintenance responsibility.

[7.6] The respondent disputes that the applicant is the true owner of the vehicle and alleges that Mr S[...], the sole member of the applicant is the beneficial owner of the vehicle.

[8] The respondent had sought condonation for the late filing of the answering affidavit.

[9] In the replying affidavit, Mr S[...] insists that he did not disclose this information to the Court because the “ the vehicle does not belong to him, the applicant is not married to the respondent, they have no children together and the applicant is not involved in the divorce proceedings.”¹ He submits that the respondent is effectively raising a point in *limine* of *lis alibi pendens* and because there is no *lis* between the applicant and the respondent this point must fail. The applicant also alleges that the vehicle is a high value car and that it is under financial constraints. It has been paying the monthly financial premiums on the vehicle and is no longer able to afford it. Notably Mr S[...] offered the use of a smaller, less expensive car namely an Urban Cruiser to the respondent.² The applicant opposed the granting of condonation.

[10] I do not intend to regurgitate all the averments in the affidavits save to say emotions ran high and it was clear that there was great acrimony between the parties.

Discussion

[11] On the issue of condonation, the respondent seeks condonation for the late filing of her answering affidavit in terms of Rule 27(3) of the Uniform Rules of Court which provides that “*a court may, on good cause shown, condone any non-compliance with these rules*”.

[12] Courts are inclined towards the view that the parties should be permitted to have their case adjudicated on the full facts.³ Among the factors that a court will

¹ Para 6.5 CL 01-52

² Annexure to the founding affidavit at CL 01-32

³ *Dickinson v SA General Electric Co (Pty) Ltd* 1973 (2) SA 620 (A) at 628.

have regard to include the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case and the prejudice to the other side. A court will always act subject to considerations of fairness and justice and the absence of prejudice to other parties.⁴

[13] The respondent explains that she has been overwhelmed by litigation and financial constraints. Her explanation for the lateness is that she is wholly dependent on Mr. S[...] financially and is unable to litigate on a similar footing with him. Her father assisted her with legal fees. She and her legal team were so focused on preparing and finalising her Rule 43 application that the current application had to take a back seat insofar as expenditure of legal costs were concerned. She admits that she together with her legal team, had forgotten about the current pending application, because of the many disputes that exist in the pending divorce.

[14] A significant factor to consider is the context in which this application has been launched, namely that the deponent and the respondent are involved in protracted divorce proceedings. The respondent has provided a reasonable explanation for the delay in this context. Moreover, given that the vehicle is already the subject of a rule 43 application, the application for condonation cannot be said to be brought merely for the purpose of delay. Hence the respondent is *bona fide* in seeking condonation for the late filing of her answering affidavit. The applicant does allege financial prejudice, but this is in relation to the affordability of the vehicle⁵. The applicant has not revealed any prejudice to it by the late filing of the respondent's answering affidavit.

⁴ Harms *Civil Procedure in the Superior Courts* B-182

⁵ The applicant did not put up any financial information in support of this claim in the founding affidavit

Accordingly condonation is hereby granted.

[15] As to the merits of the application, it is significant to note that the divorce proceedings were instituted prior to this application being launched and the applicant through its sole member was clearly aware of this fact. The basis for the respondent's refusal to return the vehicle namely that it was part of the maintenance obligations was also known to the applicant (through its sole member) if not prior to launching this application then at the very latest by the time the Rule 43 application was launched.

[16] The applicant, the registered owner of the vehicle, was or would have been aware, through its sole member Mr S[...] that the vehicle was the subject of the Rule 43 proceedings, a material fact that the applicant (through its sole member) failed to disclose to this court.

[17] The respondent has asked that I pierce the corporate veil and find that the true beneficial owner of the vehicle is the deponent Mr Schilt.

[18] In ***Mmore v Maketha***⁶ the court held at para 6:

[18.1] "It is trite that in terms of our law registration of a motor vehicle in a person's name is not sufficient to establish ownership. In terms of our abstract system of transfer of ownership, it is necessary to interrogate the real agreement between all the parties involved in the transaction to determine who a acquired legal ownership of the object in question. The question is whether there was an agreement between them that

⁶ (A3080/17) (2018) ZAGPJHC 134 (26 April 2018)

there would be a legal acquisition of ownership. Registration in the name of a particular party may be a relevant factor in this inquiry, but, if challenged, it must be weighed against all other relevant evidence in order to determine who actually acquired ownership in the eyes of the law. It may be that on the facts despite registration in a person's name there was no intention that he or she will de facto and de lege become the owner of the vehicle.”

[19] However, I do not have to make any final ruling on the beneficial ownership of the vehicle in these motion proceedings because material disputes of fact have arisen.

[20] In ***Blom and Another v Blom***⁷ the following was stated in relation to disputes of fact in motion proceedings:

[20.1] “(31) *The general rule is that the determination of which procedure to choose is contingent upon whether or not the existence of genuine material dispute of fact should have been foreseen. An anticipation of disputes of fact inexorably ties a litigant's hands to institute trial proceedings. This is apparent from the case of Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd where the foregoing was confirmed when the court held: "... There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed... There are on the other hand certain classes of case (the instances given ... are matrimonial causes and illiquid claims for damages in which motion proceedings are not*

⁷ (2022) JOL 53865 (MM)

permissible at all. But between these two extremes there is an area in which ... according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact

[20.2] (34) *Given the background of this matter, it is evident that it descends from a matrimonial dispute, an acrimonious divorce. Matrimonial matters being part of those cases where litigation by way of motion is barred, it follows that the Applicants ought to have anticipated the various disputes of fact mentioned supra. See, the Room Hire case at paragraph 32 above. Other than the nature of this case being matrimonial in nature, I agree with the Respondent that it should have dawned upon the Applicants from the exchange of correspondence between the legal representatives that disputes of fact would be inescapable."*

[21] In my view there are material disputes of fact as to who the beneficial owner of the vehicle is, whether the vehicle was "lent" to the respondent or "given" to her as part of Mr S[...]’s maintenance obligations. Mr S[...] the sole member of the applicant has on oath stated that he is authorised to act and speak on behalf of the applicant. He – and therefore the applicant - was aware prior to launching *rei vindicatio* by way of motion proceedings that the respondent’s refusal to return the vehicle (in the dispute) descends from a matrimonial dispute between them and that she was likely to challenge the ownership of the vehicle. The applicant, through Mr S[...], knew or ought to have anticipated

that material disputes of fact would be inescapable at the time when it launched these motion proceedings.

[22] On this basis alone the application stands to be dismissed.

[23] However, in my view the application has also been rendered moot considering the order granted by Nkutha- Nkontwana J. The honourable judge has granted possession of the vehicle to the respondent pending the divorce action. The respondent is therefore entitled to retain possession of the vehicle by virtue of a court order. In other words, the relief that the applicant seeks – namely the return of the vehicle – has already been determined by another court, which has ruled that the respondent may retain possession of the vehicle, pending the divorce action.

[24] As to the issue of costs, there were two primary reasons why these were granted on a punitive scale. The first that Mr S[...], the sole member, and the authorised representative of the applicant, was aware or should have foreseen that material disputes of fact were likely to arise due to the matrimonial dispute between him and the respondent before launching motion proceedings. The second is that he did not disclose significant material facts in his founding affidavit affidavit namely that he and the respondent were married, were involved in protracted divorce proceedings and that the vehicle was also the subject of other court proceedings, which could possibly have led to conflicting judgments.

[25] Finally, I note that my order of 15 November 2023 does not contain my decision to grant condonation for the late filing of the respondent's answering affidavit.

To the extent this is necessary the order is hereby varied to include:

[25.1] Para 2(c) Condonation is hereby granted for the late filing of the respondent's answering affidavit.

**Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG**

APPEARANCES

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DATES OF HEARING:
DATE OF JUDGMENT:

25 October 2023
15 November 2023 (Order)
4 December 2023 (Reasons)